STATE OF MICHIGAN

IN THE SUPREME COURT

TAMMY MCNEILL-MARKS,

Plaintiff/Appellee,

v

MIDMICHIGAN MEDICAL CENTER – GRATIOT,

Defendant/Appellant.

Supreme Court Case No. 154159

Court of Appeals Case No. 326606

Gratiot County Circuit Court
Case No. 2014-11876-NZ

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DEFENDANT/APPELLANT MIDMICHIGAN MEDICAL CENTER – GRATIOT'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

On January 24, 2017, this Court issued an order granting a MOAA pursuant to MCR 7.305(H)(1) and directing the parties to address whether McNeill-Marks's communication with her attorney constitutes a report to a public body within the meaning of MCL 15.361(d) and MCL 15.362 such that it is protected activity under the Whistleblower's Protection Act ("WPA"), MCL 15.361. Based on the text of the WPA as understood through the interpretive canons applied by this Court, the answer is no. McNeill-Marks's communication to her own attorney—and, therefore, agent—does not constitute a report, and an attorney is not a public body within the meaning of the WPA. The Court of Appeals' published opinion to the contrary is in error and does violence to the language of the WPA. This Court should reverse that opinion and reinstate the trial court's grant of summary disposition to MidMichigan.

Because the question in this Court's order is similar to the first question presented in MidMichigan's Application and because this Court has ordered the parties not to submit mere restatements of their application papers, MidMichigan incorporates and continues to rely on the facts and arguments in its Application and Reply Brief in Support of its Application.

SUMMARY OF FACTS AND PROCEEDINGS

MidMichigan employed McNeill-Marks as a nurse at its Alma, Michigan hospital. McNeill-Marks had a personal protection order ("PPO") against Marcia Fields. After McNeill-Marks encountered a wheelchair-bound Fields being pushed down a hallway at the hospital, she phoned her attorney, Richard Gay, and informed him of Fields's presence at the hospital. Specifically, McNeill-Marks testified:

> I did not tell him that she was there in any form as a patient or anything, **all I said was that she showed up at my workplace today** again, you know. [Application, **Exhibit 3** at 113:14-16 (emphasis added).]

Gay then had Fields served with a copy of the PPO while she was still in the hospital. Fields filed a complaint with MidMichigan, and MidMichigan ultimately terminated McNeill-Marks's employment for violating HIPAA and breaching hospital policies on patient confidentiality.

McNeill-Marks filed this lawsuit against MidMichigan, alleging, *inter alia*, retaliation in violation of the WPA. The trial court granted MidMichigan summary disposition, but the Court of Appeals reversed in a published opinion, holding that McNeill-Marks's communication to her private attorney constituted protected activity under the WPA because her communication was a "report . . . [of] a violation of law . . . to a public body." The Court of Appeals further explained that by virtue of membership in the State Bar of Michigan, Michigan attorneys are "public bodies" under the WPA and that whistleblower protection, therefore, extends to private attorney-client communications, such as McNeill-Marks's call to Gay. See Slip Op at 12.

ARGUMENT

I. MCNEILL-MARKS'S COMMUNICATION WITH HER ATTORNEY DOES NOT CONSTITUTE A REPORT TO A PUBLIC BODY UNDER THE WHISTLEBLOWER PROTECTION ACT.

The WPA provides:

> An employer shall not discharge . . . an employee . . . because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law . . . to a public body, unless the employee knows that the report is false . . . . [MCL 15.362.]

A private attorney-client communication does not constitute protected activity under the WPA because it is not a "report . . . of a violation or suspected violation of a law. . . to a public body."

The goal of statutory interpretation is to "ascertain the legislative intent that may reasonably be inferred from the statutory language." *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005). "The first step in that determination is to review the

language of the statute itself." *Ameritech Mich v PSC (In re MCI)*, 460 Mich 396, 411; 596 NW2d 164 (1999). "Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011) (citations omitted). A dictionary definition supplies an undefined statutory term's plain and ordinary meaning. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). Where a word has a specialized legal meaning, it is appropriate to consult a legal dictionary. *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 440; 716 NW2d 247 (2006).

As this Court has explained, a term must be considered in context under the doctrine of *noscitur a sociis*: "it is known from its associates." "Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context." *Sweatt v Dep't of Corrections*, 468 Mich 172, 179-180; 661 NW2d 201 (2003); *Breighner v Mich High Sch Ath Ass'n*, 471 Mich 217, 232; 683 NW2d 639 (2004) ("[A] statutory term cannot be viewed in isolation, but must be construed in accordance with surrounding text and the statutory scheme."); see also *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (citation and quotation marks omitted) ("In interpreting the statute at issue, we consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme."). Moreover, "Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

A. McNeill-Marks's communication with her attorney is not a report under the WPA.

1. A private communication between an attorney and his or her client is not a report as that term is used in the WPA.

The WPA does not define "report," so a dictionary supplies its plain and ordinary meaning. "Report" means "to make a charge against (a person), as to a superior." *Webster's Universal College Dictionary* (1997); accord *Black's Law Dictionary* (Deluxe 9th ed.) ("A formal oral or written presentation of facts or a recommendation for action . . . ."). This definition must be considered within the context of the WPA.

The definitions of report and its context in MCL 15.362 indicate two important criteria for determining whether a communication constitutes a "report" under the WPA. First, a report must be made to an independent third party—for instance "to a superior" or otherwise "present[ed]" to someone other than the employee or his or her agent. This is clear from the foregoing definitions and MCL 15.362's language, which permits an employee "or a person acting on behalf of the employee" to report a violation. Accord MCL 15.363(4) ("An employee shall show by clear and convincing evidence that he or she or a person acting on his or her behalf was about to report . . . ."). The corollary of this language is that an "employee, or a person acting on behalf of the employee"—i.e., an agent—cannot also be the *recipient* of a report. Just as an employee cannot report a violation to himself or herself, he or she cannot report a violation to his or her own agent. Thus, to constitute a report, an employee must communicate with an independent third party.

Second, to constitute a "report," the communication must be made to a recipient who has authority to take remedial action—or cause another person or entity to take remedial action—against the reported employer. See *Brown v Mayor of Detroit*, 478 Mich 589, 594; 734 NW2d 514 (2007) (holding that whistleblower protection applies to reports made to public

bodies where they are the employer being reported). Otherwise, the communication cannot be considered a "recommendation for action." See *Black's, supra*. Stated differently, a "report" under the WPA must involve a statement to a person or entity that has the ability to remedy a violation of the law by the employer. This interpretation is further reinforced by the fact that reporting must be made to a *public body*. Pursuant to MCL 15.361(d), public bodies are governmental actors, who typically have the power and authority to take action a result of "a violation . . . or a law or regulation or rule pursuant to law of this state, a political subdivision of this state, or the United States . . . ."

In sum, under the WPA, a communication only constitutes a "report" where (1) it is made to an independent third party and (2) that third party could take—or cause some other person or entity to remedy the "violation or suspected violation of the law."

Here, McNeill-Marks's communication to Gay was not a "report"; it was a private communication from McNeill-Marks to her agent, who had no authority to direct another person or entity to take remedial action against MidMichigan. McNeill-Marks's communication satisfies neither of the two criteria. First, Gay was not an independent third party. He was McNeill-Mark's own agent. See *Detroit v Whittemore*, 27 Mich 281, 286 (1873) ("The employment of counsel does not differ in its incidents, or in the rules which govern it, from the employment of an agent in any other capacity or business."); *Fletcher v Bd of Ed*, 323 Mich 343, 348-49; 35 NW2d 177 (1948). A principal has the right to control the conduct of its agent. *St Clair Intermediate Sch Dist v Intermediate Educ Ass'n*, 458 Mich 540, 558 n 18; 581 NW2d 707

(1998). As such, Gay was a "person acting on behalf of" McNeill-Marks and could not also be the recipient of a "report" under the WPA.[1]

Second, Gay had no power to take or direct another person or entity to take remedial action against MidMichigan. As an attorney, Gay had no more authority than any other private citizen—including McNeill-Marks herself—to respond to a suspected violation of the law. Thus, for purposes of the WPA, McNeill-Marks's communication to Gay was no more a "report" than would have been McNeill-Marks telling her mother or a neighbor about Fields's presence at the hospital.

2. The substance of McNeill-Marks's communication with her attorney indicates that it was not a report of a violation or a suspected violation of a law under the WPA.

Even if a private attorney-client communication could constitute a "report," there was no "report" here. The Court of Appeals did not address the contours of what constitutes a "report" under the WPA. The substantive basis for its conclusion that McNeill-Marks's communication with Gay satisfied the WPA, however, was the Court of Appeals' conclusion that Fields's *speech* with McNeill-Marks was sufficient to satisfy the definition of stalking. That, according to the Court of Appeals, rendered McNeill-Marks's communication with Gay a "report" of a "violation or suspected violation of the law." See Slip Op at 10.

> [E]ven if Fields's initial encounter with plaintiff in the hallway at [the hospital] was not willful, and was instead accidental, her subsequent verbal *communication* with plaintiff constituted willful, unconsented contact under MCL 750.411h(1)(e) . . . Fields made a deliberate choice to speak to [McNeill-Marks], and such deliberation make the communication willful. Moreover, the record establishes that Fields did so in a decidedly willful tone . . . Fields's conduct . . . qualified as "stalking" in violation of the PPO. [*Id.*]

[1] As an attorney, Gay was even further constrained because of the ethical restrictions to which he was bound. See MRPC 1.6(b), MRPC 1.6(c)(1). McNeill-Marks entirely controlled what Gay could do with the information she provided.

The Court of Appeals erred in relying on this basis because McNeill-Marks did not tell Gay that Fields had spoken to her. At her deposition, McNeill-Marks testified, "all I said [to Gay] was that [Fields] showed up at my workplace today . . . ." Application, **Exhibit 3**, 113:15-16. Similarly, McNeill-Marks's Complaint merely alleges "[t]hat on or about January 13, 2014, Plaintiff contacted her attorney, Richard D. Gay, to inform him that Ms. Fields was continuing to violate the Personal Protection Order by being present at her workplace." Application, **Exhibit 4** at ¶ 12. Indeed, even the Court of Appeals' recitation of the facts does not state that McNeill-Marks told Gay that Fields had spoken to her at that hospital. See Slip Op at 4. The only information communicated from McNeill-Marks to Gay was that Fields was present at the hospital.

Accordingly, even if McNeill-Marks's communication to Gay that Fields spoke to her could constitute a "report" under the WPA, which it cannot for the reasons set forth in the previous section, McNeill-Marks never told Gay that Fields spoke to her or otherwise violated MCL 750.411h(1)(e). McNeill-Marks has conceded that Fields—who had been transported to the hospital by ambulance and was being wheeled down a hallway in a wheelchair at the time she encountered McNeill-Marks—could not have willfully encountered McNeill-Marks. See Application, **Exhibit 3** at 105:3-5 ("I don't believe that . . . that anybody could necessarily - - that wouldn't be a reasonable expectation, that she could plan to pass me in the hallway."). Moreover, McNeill-Marks has conceded that McNeill-Marks was the one who initiated contact with Fields. See Application, **Exhibit 3** at 103:4-7. Thus, McNeill-Marks had no good faith basis to believe that Fields violated MCL 750.411h(1)(e). See *Truel v City of Dearborn*, 291 Mich App 125, 138; 804 NW2d 744 (2010) (explaining that a "report" must be made in good faith); accord MCL 15.362 (excluding reports of violations that the employee knows to be false).

For these reasons, McNeill-Marks's communication with Gay does not constitute a report within the meaning of the WPA.

B. A private attorney is not a public body under the WPA.

1. The SBM is a judicial agency, not an "other body" created by state authority.

As explained further in MidMichigan's Application, a private attorney is not a "public body" under the WPA. The Court of Appeals held to the contrary, citing MCL 15.361(d)(iv), which defines "public body" to include: "Any other body [e.g., not an agency of the executive or legislative branches, local government, or law enforcement] which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body." The Court of Appeals concluded that the SBM was such an "other body" and that, as an attorney, Gay was a "member" of the SBM.

The Court of Appeals was mistaken, however, because the SBM is a judicial agency. See *State Bar of Mich v Lansing*, 361 Mich 185, 193; 105 NW2d 131 (1960). It cannot, therefore, be an "other body." The WPA subsection defining "public body" to include "[t]he judiciary and any member or employee of the judiciary," MCL 15.361(d)(vi) excludes judicial agencies—unlike the subsections addressing the executive and legislative branches of government. See MCL 15.361(i) and MCL 15.361(ii). Because the Legislature included agencies of the executive and legislative branches, its exclusion of judicial agencies indicates its intention to exclude agencies such as the SBM from the definition of "public body." See *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). If judicial agencies are included in the definition of "public body," despite their absence from MCL

15.361(d)(vi), reference to legislative and executive agencies would be surplusage because they too would be "public bodies" via the "other bodies" provision. Thus, the Court of Appeals' interpretation would render nugatory the references to "agenc[ies]" in MCL 15.361(i) and MCL 15.361(ii).

Because the SBM is not an "other body" under MCL 15.361(d)(iv) or otherwise included in the definition of "public body" under MCL 15.361(d), it is not a public body under the WPA.

2. Attorneys are not members of the SBM under the WPA.

Even were that not the case, attorneys are not members of the SBM as that term is used under the WPA. As further explained in MidMichigan's Application at 11-14, "member" means "a person belonging to a legislative body." Accord *Black's Law Dictionary* (Deluxe 9th ed.) (defining "member" as "[o]ne of the individuals of whom an organization or deliberative assembly consists, and who enjoys the full rights of participating in the organization – including the rights of making, debating, and voting on motions – except to the extent that the organization reserves those rights to certain classes of membership.").

Applying the doctrine of *noscitur a sociis* to the WPA, "member" means someone belonging to the relevant entity with authority or deliberative power. For instance, a "member" "of the legislative branch," MCL 15.361(d)(ii), or "of the judiciary," MCL 15.361(d)(vi). Unlike "members" of the legislative branch or judiciary, members of the SBM—by virtue of their membership alone—have no authority or deliberative power within the SBM. Accordingly, for purposes of the WPA, attorneys are not members of the SBM.

Unmoored from statutory context, the logic of the Court of Appeals' opinion could just as easily be used to classify a high school janitor a "public body" under the WPA because the janitor is an employee of a school district under MCL 15.361(d)(iii). Or it could

classify as a "public body" a lawn care provider hired by the Governor to mow the lawn at the Capitol because the lawn care company is a corporation "who performs a service for wages or other remuneration under a contract of hire." See MCL 15.361(a) (defining "employee"); MCL 15.361(c) (defining "person" to include a corporation); MCL 15.361(d)(i). Just as clearly as these entities are not public bodies to which reports of wrongdoing are extended whistleblower protection, neither are all attorneys.

For these reasons, a private attorney is not a public body within the meaning of the WPA.

CONCLUSION

As set forth in this brief and MidMichigan's Application, McNeill-Marks's communication with her attorney does not constitute a report to a public body within the meaning of MCL 15.361(d) and MCL 15.362 such that it is protected activity under the WPA. McNeill-Marks's phone call to Gay was neither a report nor was it made to a public body. On the contrary, it was a private attorney-client communication to which the WPA affords no protection. Accordingly, this Court should reverse the Court of Appeals' published opinion to the contrary and reinstate the trial court's grant of summary disposition to MidMichigan.

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